No. 83-697

In the Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the revised regulations issued by the Secretary of Labor under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, are within his discretion to determine the "prevailing wage" for federal and federally-assisted construction projects.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 712 F.2d 611. The opinion of the district court granting a preliminary injunction (Pet. App. 49a-67a) is reported at 543 F. Supp. 1282. The opinion of the district court granting a permanent injunction (Pet. App. 68a-74a) is reported at 553 F. Supp. 352.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1983. A petition for rehearing was denied

on September 16, 1983 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on October 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, guarantees wages based on locally prevailing rates to construction workers under contracts with the United States or the District of Columbia. The Act, first adopted in 1931 and substantially revised in 1935, provides (40 U.S.C. 276a(a)) that all such contracts for construction of public buildings or public works with a cost in excess of $2,000:

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed * * *.

Since 1935, Congress has extended the Act's prevailing wage requirements by statute to many other federal and federally-assisted construction programs, generally by requiring payment of wages determined in accordance with the Davis-Bacon Act.[1]

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[1] See, *e.g.*, the Housing and Urban Development Act of 1965, 42 U.S.C. 3107; the Elementary and Secondary Education Act of 1965, 20 U.S.C. 1232b; the Federal-Aid Highway Act, 23 U.S.C. 113; and the Urban Mass Transportation Act of 1964, 49 U.S.C. 1609. A list of statutes incorporating Davis-Bacon provisions can be found at 29 C.F.R. Pt. 1 App. A.

The Act requires that the locally prevailing wage for each class of laborers or mechanics be "determined by the Secretary." 40 U.S.C. 276a. In fulfilling this responsibility, the Secretary has since 1934 issued regulations to implement the Act. These regulations, inter alia, provide a formula for calculating the prevailing wage, indicate the type of raw wage data that the Secretary will use in making those calculations, state the procedures for making individual wage determinations, and detail enforcement procedures. See 29 C.F.R. Pts. 1 and 5.

2. On August 14, 1981, the Secretary published a proposed revision of the Davis-Bacon Act regulations. 46 Fed. Reg. 41443-41470. During the 60-day comment period that followed, the Secretary received approximately 2,200 comments representing the views of Members of Congress, state and local government officials, contracting agencies, unions, contractors, and academics. See 47 Fed. Reg. 23644 (1982). The comments and the economic studies included in the record fill nine volumes totalling 4,245 pages. The Secretary published new final rules on May 28, 1982, with a scheduled effective date of July 27, 1982. 47 Fed. Reg. 23643-23679. No procedural challenge to the regulations has been made.

Four changes made by the May 1982 regulations are at issue in this case: [2]

(a) *Formula for Prevailing Wage.* The Secretary must determine a single "prevailing" wage for each class of workers employed on similar projects in the locality in which a federal project is being con-

[2] The district court invalidated a fifth change made by the new regulations, concerning the weekly reporting requirement as to wages paid, and the court of appeals affirmed that holding. Pet. App. 39a-44a.

structed. This prevailing wage is then incorporated in each covered contract. Since workers within each class typically receive a range of wage rates, the Secretary must use a statistical method to determine a single "prevailing" rate for each class. Under the new regulations, a two step formula is used. First, if a single rate is paid to a majority of workers in the class, that rate is deemed prevailing. Second, if there is no majority rate, then the weighted average of the wage rates paid is deemed to be prevailing. Section 1.2(a)(1), 47 Fed. Reg. 23652 (1982). Under the prior regulations, the same formula applied, except that, as an additional middle step in the formula, where no single rate was paid to a majority of workers any rate paid to at least 30% of the workers would be deemed "prevailing." See 29 C.F.R. 1.2(a) (1982).

(b) *Metropolitan Data in Rural Areas.* The Act requires the Secretary to set a separate prevailing wage for each "city, town, village, or other civil subdivision of the State" where covered work takes place. Normally, the Secretary uses the county as the local geographic unit. See Section 1.7(a), 47 Fed. Reg. 23654 (1982). But some rural counties do not have enough recent construction upon which to base wage determinations for each type of construction. When this is the case, the new regulations provide:

> Wages paid on similar construction in surrounding counties may be considered, *provided* that projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county and [vice versa].

Section 1.7(b), 47 Fed. Reg. 23655 (1982) (emphasis in original). The old regulations did not specifically address the issue of metropolitan and rural data (see 29 C.F.R. 1.8(b) (1982)), but the Department's

1979 Construction Wage Determination Manual did provide that "'[*g*]*enerally*, a metropolitan county should not be used to obtain data for a rural county (or visa [*sic*] versa)'" (Pet. App. 15a (emphasis added; brackets in original) (quoting J.A. 10)).

(c) *Exclusion from Wage Surveys of Prior Projects Subject to Davis-Bacon.* Under the new regulations, when the Secretary compiles wage rate data for two of the four general types of construction—building and residential [3]—he "will not use data from Federal or federally-assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." Section 1.3(d), 47 Fed. Reg. 23652 (1982). In the past, projects subject to the Act were included in the surveys.

(d) *Helpers.* The May 1982 regulations recognize a class of workers, known as helpers, that was infrequently permitted on Davis-Bacon projects in the past. A helper is defined by the new regulations as:

> a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and

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[3] "Building construction" generally refers to "'sheltered enclosures with walk-in access'"; "residential construction" includes houses and apartments of no more than four stories. The other two types of construction, which are unaffected by this new regulation, are "highway" and "heavy" (the latter, a catch-all that includes items such as dams, railroads, subways, and canals). See Pet. App. 16a n.3.

> preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

Section 5.2(n)(4), 47 Fed. Reg. 23667 (1982).[4] The other recognized categories of workers are: journeymen, laborers, and apprentices and trainees. While liberalizing the definition of permissible "helpers," the new regulations also limit their use to no more than two helpers for every three journeymen employed on a project. Section 5.5(a)(4)(iv), 47 Fed. Reg. 23670 (1982).

The Secretary explained that the purposes for permitting expanded use of helpers were to reflect the widespread practice in private construction, to expand the pool of contractors available to bid for federal jobs, to save money and increase productivity, and to increase job opportunities for less skilled workers and new entrants into the market, including young people, women, and members of minority groups. 47 Fed. Reg. 23647 (1982).

3. Shortly after publication of the new regulations, petitioner filed suit in the United States District

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[4] If a worker is listed as a helper but does not actually fit this definition, he or she must be paid as a journeyman (or laborer, if appropriate). Section 5.5(a)(4)(iv), 47 Fed. Reg. 23670 (1982).

In addition, the May 1982 regulations provide that a helper classification may be recognized in any locality where the use of helpers is "identifiable." Section 1.7(d), 47 Fed. Reg. 23655 (1982). The court of appeals held that this provision was contrary to the Act and that, as a general matter, a helper classification may be recognized only where the use of helpers is a "prevailing" local practice (Pet. App. 26a-29a).

Court for the District of Columbia, seeking to enjoin their implementation. On July 22, 1982, five days before their effective date, the district court issued a preliminary injunction restraining all of the challenged changes (Pet. App. 49a-67a). The court issued a permanent injunction on December 23, 1982, as to all but one of the changes (*id.* at 68a-74a). The court explained that "the statutory language and the legislative history regarding the basis for the five types of regulations at issue [are] somewhat ambiguous, with language and history supporting the Secretary's interpretation more strongly with respect to some of the regulations and less strongly with respect to others" (*id.* at 68a-69a). The court upheld the new formula for calculating the prevailing wage because "[t]he Act itself does not provide a definition of 'prevailing wage,' and it is abundantly clear that the definitional task was entirely delegated to the Secretary" (*id.* at 70a). As to the other revisions, the court "ultimately resolved the doubts * * * in favor of the [petitioners]." In its view, "each of the regulations issued by the present Secretary of Labor is wholly inconsistent with administrative interpretation contemporaneous with the enactment of the statutes about 1935 and consistent administrative practice since then." *Id.* at 69a.

4. The court of appeals upheld all four of the regulations at issue (Pet. App. 1a-44a).[5] Relying on

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[5] As indicated at page 3 note 2, *supra*, and page 6 note 4, *supra*, the court of appeals held invalid a regulation concerning the weekly reporting requirement as to wages paid, and part of another regulation, allowing recognition of helpers where that practice is "identifiable" rather than "prevailing." We have not sought review of those rulings.

Batterton v. *Francis*, 432 U.S. 416 (1977), the court found that because "the statute empowers the Secretary to adopt 'regulations with legislative effect,' " its "task is limited to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program' " (Pet. App. 10a (brackets in original) (quoting *Batterton*, 432 U.S. at 425, 428)). As to each of the regulations, the court concluded from the statutory language and the legislative history that Congress had granted sufficient discretion to the Secretary to select any one of numerous approaches, including the one actually adopted. The court concluded that "the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing" (Pet. App. 9a). Thus, as to the formula for calculating the prevailing wage, the court upheld the new definition of "prevailing" because it "is within a common and reasonable reading of the term" (*id.* at 10a).

On the exclusion of urban counties from rural wage determinations, the court of appeals explained that the literal language of the Act "would appear to refer the Secretary only to projects in the same civil subdivision" where the project is to be built, but that Congress understood that the Secretary had the power to go beyond the civil subdivision in rural areas where there is little construction (Pet. App. 11a-12a). "In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute" (*id.* at 13a). The court found that the new regulation is "rational and furthers the purposes of the statute" (*id.* at 14a).

Similarly, the court of appeals found "substantial evidence in the legislative history and, more importantly, in the premises of the Act, that suggests that Congress did not intend wages on federal projects to be considered at all" in surveys of wages used for calculating the prevailing wage (Pet. App. 17a). Federal wages were to be set by reference to wages in private construction. During the 1930s, however, there was insufficient private construction to establish a base. Therefore, the Secretary "exercised his discretion to include these [federal] projects as a necessary expedient during the Depression in order to achieve the ends of Congress" (*id.* at 21a). Now that conditions had changed, the court reasoned, the Secretary has the "power to fine tune his exercise of discretion" (*ibid.*).

The court of appeals explained that the regulation recognizing a wider scope for helpers "would no longer define the 'classes' of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman" (Pet. App. 30a). While the court acknowledged some statements in the 1935 legislative history suggesting that Congress considered classes as defined by task, it concluded that Congress had not "intended to bind the Secretary to the job classification existing at the time, but rather merely spoke against a background of the task-based union practice being the prevailing one" (*id.* at 32a). Those statements, the court reasoned, do not "vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area" (*id.* at 35a). The court noted that the use of helpers is widespread in private industry today (*id.* at 24a), and concluded that the Secretary's action "is an en-

tirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers" (*id.* at 38a).

In reaching its conclusions, the court of appeals stressed that the district court was wrong to rely so heavily on past administrative practice. The court of appeals stated:

> [T]he Secretary was acting in an area as to which he had some discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer. As the District Court recognized, *see* 543 F. Supp. at 1290, prior administrative practice carries much less weight when reviewing an action taken in the area of discretion, when little more than clear statement is required, than when reviewing an action in the field of interpretation, where it is thought that the agency's contemporaneous and consistent interpretation of one of its enabling statutes is reliable evidence of what Congress intended.

Pet. App. 15a-16a.[6]

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[6] On October 4, 1983, the court of appeals stayed issuance of its mandate until October 26, 1983 (Pet. App. 48a). Petitioners filed their petition for a writ of certiorari on the latter date. The regulatory changes enjoined by the district court therefore have not taken effect. See Fed. R. App. P. 41(b). The change in the formula for computing the "prevailing wage" went into effect as of June 28, 1983, after being upheld by the district court. See 48 Fed. Reg. 19532 (1983).

ARGUMENT

The court of appeals applied settled principles of judicial review of agency rulemaking, and carefully examined relevant legislative and administrative history, in sustaining the Secretary's actions in part and overturning them in part. The court's interpretation of the scope of administrative discretion under the Davis-Bacon Act conflicts with no other judicial decision, and warrants no further review by this Court.

1. The Davis-Bacon Act requires that wages on covered projects be "based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding classes of workers on similar projects in the locality. 40 U.S.C. 276a(a). Under this "explicit delegation of substantive authority" (*Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981)), the Secretary's rules are " 'entitled to more than mere deference or weight.' " They are "entitled to 'legislative effect.' " *Ibid.* (quoting *Batterton* v. *Francis*, 432 U.S. 416, 425, 426 (1977)). Indeed, the key statutory language delegating regulatory authority under the Davis-Bacon Act—"determined by the Secretary"—is virtually identical to that under consideration in *Gray Panthers* and *Batterton*.[7] The term "prevailing wage" is not subject to a single correct interpretation, any more than was the term "available" at issue in *Gray Panthers* or the term

[7] Petitioners attempt to distinguish *Batterton* on the ground that in *Batterton* Congress "authorized the HEW Secretary to establish *standards* according to which the states were to determine claimants' 'unemployment' status in particular cases" (Pet. 11 n.2 (emphasis in original)). However, it is not significant that in *Batterton* the Secretary established *standards* while under Davis-Bacon the Secretary establishes actual *wage schedules*. The degree of discretion imparted is the same.

"unemployment" at issue in *Batterton;* rather, it sets forth a range of discretion necessarily calling for legislative-type judgments. That is why Congress conferred authority on the Secretary to "determine" its meaning and application. Cf. *Gray Panthers,* 453 U.S. at 43; see Pet. App. 15a. Thus, as this Court has stated, "[a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different way." *Batterton,* 432 U.S. at 425. The regulations must be allowed to stand unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 426.

Modifications in extant regulations are subject to the same standard of review. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.,* No. 82-354 (June 24, 1983), slip op. 10. Past administrative practice can often be relevant to the analysis of regulatory changes, as the court of appeals acknowledged (Pet. App. 15a-16a, 19a-21a, 36a-37a), but the ultimate legal issue remains the same: is the agency action within the scope of statutory discretion? Even petitioners acknowledge (Pet. 6-7) that "[t]he enabling statute may leave large areas of discretion and contemplate a continual process of adaptation to new circumstances or a careful restudy may persuade that the original regulation is unsound when measured against the statute or has proved defective in operation as a means for carrying out the statute." [8] See *American Trucking*

[8] We cannot agree with petitioners (Pet. 6) that "the reconsideration of regulations * * * pose[s] a substantial threat to the rule of law." Both Congress (5 U.S.C. 610) and the President (Exec. Order No. 12,291, 3 C.F.R. 127 (1981 Comp.) have required agencies to undertake periodic review

Ass'n v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) ("we agree that the [agency], faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice").[9]

Petitioners bear a heavy burden of showing that the challenged regulations "bear[] no relationship to any recognized concept of [prevailing wages]," that they "would defeat the purpose of the [Davis-Bacon Act]," or that they are otherwise arbitrary, capricious, or not in accordance with law. *Batterton* v. *Francis*, 432 U.S. at 426, 428. They have not made that showing.

2. Petitioners make no showing whatever as to three of the challenged regulations: the new prevailing wage formula, the ban on use of metropolitan

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of existing regulations to determine whether changes should be made. Indeed, the ability to change course in response to new conditions or new ideas is one of the key advantages of the administrative process.

[9] *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, *supra*, and *BankAmerica Corp.* v. *United States*, No. 81-1487 (June 8, 1983), are not to the contrary. In *State Farm*, the Court adhered to the traditional "arbitrary and capricious" standard of review, striking down the agency's decision to rescind prior regulatory requirements only upon a conclusion that the agency failed to present an adequate basis and explanation for its decision. Slip op. 3. The Court expressly stated that the rescission or modification of an existing regulation is subject to the same standard of review applicable to promulgation of a new regulation. Slip op. 10. *BankAmerica Corp.* did not concern a modification in rules promulgated within the discretion of the agency, but the interpretation of statutory language that had previously been interpreted in one way by Congress, the business community directly affected, and the enforcing agencies for more than 60 years. Slip op. 9.

data in rural areas, or the exclusion of prior Davis-Bacon projects from wage surveys. With respect to these three regulations, petitioners provide a cursory description in the statement of facts and nothing more (Pet. 5). The court of appeals carefully examined the provisions of the Act and the pertinent legislative history as to each of these three regulatory changes. It also carefully examined the reasons stated by the Secretary to explain his revisions, and found them satisfactory (see pages 8-9, 10, *supra*). Nothing in the petition casts any doubt upon the correctness of the court's judgment upholding the Secretary's exercise of discretion.

3. Petitioners focus on the regulatory change permitting expanded use of helpers. They correctly point out (Pet. 15) that the statutory language, as well as the legislative history, indicates that each class of laborers and mechanics for which a wage schedule is to be established should be differentiable. Otherwise, employers could evade wage requirements by misclassifying workers. However, as the court of appeals concluded (Pet. App. 33a), the basis for distinguishing between classes of laborers and mechanics need not be "task-oriented"; nothing in the statute prohibits the Secretary from drawing a distinction—as he has here—on the basis of degree of supervision.

Indeed, the Secretary's revised approach draws powerful support from the central purpose of the Davis-Bacon Act: "to have federal wages mirror those prevailing in the area" (Pet. App. 35a and sources cited therein). To preclude the use of helpers where such use is a "prevailing practice" in the community, as petitioners suggest, would distort the local labor market and skew the wage scale. Petitioners also disregard the other reasons stated by the Sec-

retary for the regulatory change—including increasing job opportunities for less skilled workers, especially young people, women, and members of minority groups now frozen out by restrictive federal requirements limiting the demand for semi-skilled labor, encouraging job training, increasing productivity, and enabling a broader class of contractors to compete for government work. See 47 Fed. Reg. 23651 (1982). Each of these is a legitimate factor to be considered.

Petitioners' apparent argument (Pet. 17)[10] that the use of helpers is flatly inconsistent with the Act itself is without merit. Petitioners do not dispute that some use of helpers has always been permitted by the Secretary. See 47 Fed. Reg. 23647, 23649, 23659 (1982). The regulations at issue merely *expand* the existing helper classification. It is difficult to see how petitioners can argue that the prior regulations, which permitted the use of helpers to a limited extent, were valid, yet assert that the May 1982 regulations are invalid on the ground that they permit the use of helpers. See Pet. App. 30a-32a n.9.

Nor is petitioners' argument supported by the legislative history. Petitioners rely heavily (Pet. 18-21) on selected quotations from the legislative history to support their view that recognition of a helper classification is inconsistent with the statutory purpose. We submit that the court of appeals more accurately summed up the legislative history as containing

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[10] In the district court, petitioners expressly stated that " 'we do not take the position that Congress *precluded* recognition of semiskilled helpers under the Davis-Bacon Act. . . . Quite clearly, the Davis-Bacon Act does allow recognition of semiskilled workers when they do, in fact, represent a prevailing practice and form a *distinguishable* class who perform discrete tasks.' " Pet. App. 32a n.9 (citation omitted; emphasis and deletion in original).

"fairly ambiguous legislative references to a task-based classification system" (Pet. App. 35a). These references, taken in context, do not indicate that "Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one" (*id.* at 32a).

During consideration of the 1935 amendments to the Act, Congress criticized the practices then being followed under the 1931 version of the Act, focusing on the fact that employers were creating semi-skilled classifications that did not exist in private industry and were forcing skilled workers into these artificial classes, with their lower rates of pay. Congress may well have considered that classes in private industry were task-based at the time, since union jurisdictional rules are typically task-based,[11] but its underlying concern was that some contractors were disregarding the prevailing practice, whatever it happened to be. It is thus consistent with the 1935 legislative history for the Secretary to change the basis on which he will distinguish classes of workers to mirror the prevailing practice in the industry today. Times change;

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[11] Petitioners complain that the court of appeals gave "controlling significance" to a passage from the legislative history that shows that Congress did not intend for the Act to impose union wage scales on all federal projects (Pet. 20 & n.5). To the contrary, the court only stated that this passage presents "[f]urther evidence" that "suggests" that the court had reached the right conclusion (Pet. App. 34a, 35a). In any event, the court's analysis was valid: the fact that Congress deliberately decided not to require the Secretary to use union wage scales as the standard for the Act is strong evidence that it did not intend to mandate the use of union jurisdictional rules. These matters are left in the sound discretion of the Secretary. See Pet. App. 24a-25a.

labor practices change; regulations may change with them.

At bottom, petitioners' concern seems to be that the revised classification scheme may be more difficult to enforce (Pet. 19). However, as the court of appeals pointed out (Pet. App. 37a), judicial deference to agency decisions "is properly near its greatest" on questions of the relative enforceability of different approaches to administering a statute. Moreover, since the helper classification is commonly used in private construction, there is no reason to suppose that it will prove unworkable on federal projects. See Pet. App. 38a.

4. In sum, Congress determined to solve the problem of underpayment of construction workers on federal projects by legislating certain general concepts under which each class of workers is to be paid no less than the wage prevailing locally for the corresponding class of workers and by giving the Secretary wide discretion to translate those broad concepts into specific minimum wage rates to be incorporated into each covered contract. Each of the four regulations here is consistent with the general concepts of the Act and within the latitude that Congress granted to the Secretary. Accordingly, the court of appeals correctly concluded that the regulations are valid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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